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ABSTRACT

The argument advanced in this paper maintains that cable television differs from broadcasting, due to the local character of certain cable services; that the current obscenity standards, as articulated by the Supreme Court, mandate community definitions of obscenity; and that such Supreme Court decisions apply to cable television. Separate sections consider judicial decisions relevant to obscenity standards, obscenity and broadcasting, and cable regulation; the community, the cable, and obscenity; the uniqueness of cable; and the uniqueness of cable television as compared with other broadcast media. (Author/AA)

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Obscenity and Indecency:

National vs. Local Standards as Applied to Cable Television

Paper Presented to the AEJ

by

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Introduction:

Arguments began March 30, 1976, in the latest Federal Appeals case involving broadcast obscenity.[1] WBAI-FM, New York City, brought the appeal from a declaratory order of the Federal Communications Commission (FCC) curtailing the broadcast of a cut from a George Carlin album entitled "Filthy Words."[2] The order stemmed from a listener complaint that obscene language was heard on the station the afternoon of October 30, 1973, as "part of a comedy monologue."[3]

The order and accompanying opinion by the FCC outlined grounds for "special treatment" of broadcast communications that may be "indecent" under section 1464 of the U.S. Criminal Code.[4] The FCC concluded that certain words depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium, and are accordingly "indecent" when broadcast over radio or television.[5] The Commission noted WBAI broadcast those words "at a time when children were undoubtedly in the audience", and were pre-recorded and "broadcast over and over and deliberately broadcast."

The FCC imposed no direct administrative sanctions on WBAI, but rather "associated" the order with the station's license file in the event subsequent complaints were received. It invited all aggrieved persons to seek FCC reconsideration, and, if still not satisfied, to appeal for judicial review.

The FCC used this declatory action to generally clarify the standards which the Commission utilizes to judge "indecent language." The invitation for reconsideration and judicial review, concurrent FCC moves to secure legislation reaffirming its authority to regulate obscenity, and its attempts to

extend that authority to cable television, suggest Commission interest in influencing local standards in "indecency and obscenity." Such implications suggest considerable value in reviewing the definition of "obscene and indecent" as it relates to telecommunication under recent Supreme Court decisions and in FCC jurisdiction.

The argument advanced in this paper maintains that cable television differs from broadcasting due to the local character of certain cable services, that the current obscenity standards as articulated by the Supreme Court mandate local community definitions of obscenity, and thus such Supreme Court decisions apply to cable television.

Obscenity Standards, Obscenity and Broadcasting, Cable Regulation: The Current Situation:

In 1973 the U.S. Supreme Court revised judicial standards for obscenity, standards which apply today. In Miller v. California[6] the Court upheld in part, and changed in part, standards established sixteen years earlier in Roth v. United States.[7] The Roth rule held: First, that obscene materials are not protected by the First Amendment. Second, to be judged obscene the courts must decide that "...whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."[8] In 1964 in Jacobellis v. Ohio a third standard was added. Justice Brennan in Jacobellis stated the Roth test requires the work in question must go "...substantially beyond (the) limits of candor" to be deemed obscene.[9] A fourth test was added in 1966 in Memoirs v. Massachusetts when the Court stated for a work to be obscene it must be "...utterly without redeeming social value."[10]

Miller reaffirmed both parts of the Roth test, struck down the Memoirs "...utterly without redeeming social value" test, and reaffirmed the Jacobellis

test. But Miller emphasized that a work must now be judged "patently offensive", as the Jacobellis test called for, by local, and not national standards. The critical thrust in Miller asserted that local community standards must now prevail in determining if the work, "...taken as a whole appeals to prurient interests," and if it is "patently offensive." Thus, the local community decides what is obscene, and, consequently, which work is not protected by the First Amendment.

In broadcasting, as late as 1974, the D.C. Court of Appeals was reaffirming the right of the FCC to regulate over the air broadcasting in obscenity matters.[11] The case, Illinois Citizens, arose out of the FCC's decision in the Sonderling[12] case a year earlier. Radio station WGLD-FM in Oak Park, Illinois, owned by the Sonderling Corporation, began a program of open and frank sex talk on the air. Callers freely discussed their sex lives and ways to improve them, as well as discussions on fellatio and cunninlingus. In April, 1973, the Commission fined Sonderling $2,000 for violations of the Federal Communications Act of 1934, and the United States Criminal Code.[13]

The Sonderling Corporation chose not to contest the case, but a citizens group in Illinois appealed the Sonderling decision for the owners. Granted standing by the courts the group claimed that by bowing to FCC pressure to take sex talk off the air, Sonderling had violated the group's First Amendment right to hear and be informed. The court upheld the FCC's right to determine what is, or is not, "obscene, indecent or profane" in radio broadcasting.[14]

In 1972 the FCC promulgated its cable television rules which, with some modification, remain in force today.[15] The substance of section 1464 of the U.S. Code which forbids the cablecasting of "obscene or indecent materials," appeared in those rules.[16]

In several cases which arose before the 1972 rules the Court had recognized an apparent grant of plenary powers to the FCC to regulate cable to the extent

necessary to protect over-the-air television broadcasting.[17] The Court here seemed to admit an expansive FCC authority to regulate cable, but a strong dissent, and hesitant concurring opinion with the plurality by Chief Justice Burger, in Midwest Video appealed for legislative affirmation of FCC authority in the cable field. The Court may allow expanded FCC jurisdiction in the future, but well grounded exercises of pre-emptive authority in the entire field of cable are not evident.[18] In fact a recent appeals decision has admitted state rather than FCC jurisdiction in the area of intrastate, non-video cable.[19]

The FCC failed to use its full powers over cable in the 1972 rules. The Commission then announced the rules to be an experiment in regulation, and stated that cable systems were neither simply broadcasters nor common carriers.[20] Regulation was to be fixed somewhere between restrictions placed on broadcasters, and those of common carriers. The rules also stressed that cable television is admitted to be more local in character than broadcasting service.

The Community, the Cable, and Obscenity:

While over-the-air broadcasting may cross many geographical and political boundaries with its signals, a cable system generally is confined to one political territory such as a city, town or perhaps an entire county.

The FCC left with local governments the burden of creating and maintaining detailed standards for operation of cable television systems. The local community develops a franchise agreement, accepts bids for the building of the system, stipulates the compensation rate and duration of the franchise, sets procedures for handling complaints, sets franchise fees within reason and other requirements all within generalized guidelines established by the FCC.[21]

Given that the franchising authority is a territorial political entity, it cannot generally function beyond its boundaries. Thus, the cable franchise is granted only for a specific area, and other communities are not significantly affected.

The 1972 rules set forth two basic types of programming and regulation. First, carriage of off-the-air broadcast signals is limited by the location of the cable system in the number and types of stations it may carry, grandfathering provisions, exclusivity rules and so on.[22] Second, the rules outlined provisions for "cablecasting." Cablecasting is the origination of programming by a local cable operator, or the provision of the potential of programming to others. Each cable system must dedicate four types of channels for public use. These are the public, educational and local government "access" channels, and a fourth type of channel to be leased to the public.[23] It is these cablecasting channels which are germane to the arguments set forth here regarding adult programming and cable television.

The Supreme Court several years before Miller had agreed that each individual has a right to decide what is or is not obscene. In Stanley v. Georgia[24] police had raided Stanley's home seeking gambling paraphernalia. Instead they came upon three reels of film, admittedly obscene by the defendant. State law prohibited the possession of knowingly obscene materials, and Stanley was convicted. The Court reversed.

Justice Marshall, writing for the Court, chose to base his argument on the First Amendment. Maintaining that under Roth obscene materials were not protected by the First Amendment, he proceeded to differentiate between distribution of such materials and possession (emphasis ours). And "If the First Amendment means anything, it means the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[25] Furthermore, the First Amendment does protect the right of the individual to "...receive information and ideas, regardless of their social worth."[26]

However, in Stanley the Court hinted there was only a limited right to receive obscene materials and it is highly conditioned by the need to protect unwilling receivers and children. It is these two groups that also concerns

the FCC in its regulation of broadcasting. The Commission has argued in each broadcast obscenity case that broadcasting is a medium different from others in that (1) broadcast signals come into the home in an unsuspecting manner, and (2) unwilling adults and children may be in the audience receiving any offensive materials which may be broadcast.[27]

But adults who are not offended by such programs may have rights and needs that demand consideration. Justice Harlan, dissenting in Roth, wrote:

> It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight states, forty-eight different experimental social laboratories...Different states will have different attitudes toward the same work of literature. The same book which is freely read in one state might be classified as obscene in another.[28]

Sixteen years later in Miller, the Court agreed with Justice Harlan.

The idea of forty-eight separate experiments stated by Justice Harlan might reach forty-eight thousand if we accept the notion of community experimentation obscenity standards stated in Miller. Commissioner Nicholas Johnson, dissenting in 1973 in Sonderling, stated:

> In the instant case, the majority focuses only on portions of the challenged program, makes absolutely no attempt to delineate the relevant "community" in question, and makes no effort whatsoever to determine the nature of the relevant community's standards. As a result, it seems rather bizzare for the majority to conclude that (the program), taken as a whole, is patently offensive to the undefined community with unknown standards when it knows nothing of (1) the whole program, (2) the community, or (3) its standards.[29]

The Commission majority in Sonderling was unsure of its interpretation of the law and encouraged to appealsfor a court decision. In Miller the Court acted. Yet it is still not clear what is meant by "community" or "local" standards, "average" person and the like. Local governments throughout the country are wrestling with this problem, thrown back to them by the Supreme Court.

The problem is that on one hand in Miller, the Court says that the local community must now decide what constitutes obscenity, and on the other the FCC maintains it must maintain national standards no matter what the community decides. In the absence of community laws strictly forbidding "X" or "R" type films, or in the instance where the community encourages all forms of expression, the question that remains is whether the cable operator is free to allow this type of programming on his system without repercussions from a regulatory agency setting national standards? Can any independent entrepreneur now lease a cable channel and program as he sees fit within local community standards? The argument here is that under the Miller rule such must be the case. The FCC is violating that rule if it seeks to maintain a national standard for obscenity that relies on a tenuous relational nexus to over-the-air broadcasting.

The Uniqueness of Cable:

It would seem at first that cable television differs little from over-the-air broadcasting. It comes into the home almost unannounced, is readily available to children, and unwilling adults may just happen to see or hear portions of an objectionable program. While this is true in part, cable markedly differs in its potential for selectivity.

The technology exists today, and is being employed at several locations, to make it impossible for anyone to watch certain cable channels unless they actively seek to do so. Today this is found generally in pay-cable channels where the viewer must "order up" a show using various technical devices. Without a key or card to allow one to tune in a show, all the viewer receives is a scrambled signal. Frank and open discussions of a controversial nature, or shows considered indecent or obscene by some need not be selected by those viewers, and that channel signal would remain scrambled. If the marketplace was the deciding factor in determining the fare on these channels, dollar votes would decide what was to be offered.

In fact, "dollar votes" could determine a great deal of alternative programming over the leased channels. The opera, symphonies, plays and so on could also be offered via the leased channels for a direct charge to the viewer. In many instances it is not the banning of Deep Throat or Carnal Knowledge from television which is upsetting; rather it is the elimination of truely artistic works from the television screen that is deplorable. The censorship practices of the television networks and local stations leave many movies and theater productions mere skeletons of their original performance. Becase they may offend some, the many are deprived. Hair, Boys in the Band, Oh Calcutta all could be emjoyed and paid for by millions at home via television, yet will probably never see an airing on network television. Many first-rate productions are not broadcast because program practices demand the program not offend children or those "...whose minds are open to such immoral influences..." as in the days of the Hicklin rule.[30]

In the WUHY case Commissioner Johnson brought out another point. He argued the swear words of the "lily-white middle-class" were acceptable to the Commission, while those of the poor, young and black were not. "Fuck," "shit," "motherfucker" and many other words are common everyday terms among several vast age, racial and ethnic groups. Hearing them over the air, uttered by actors or interviewees, is not only not disconcerting, it is life. "Tell it like it is," would be the probable reaction; not shock at hearing "obscene" or "indecent" terms for the first time.

Many art forms have been banned, and much speech has been denied, via broadcast channels. The argument here is not that the local cable system should become an electronic sleazy skin flick and porno shop. Rather it is urged that cable is unique because it can program for minority tastes, needs and demands not currently served by over-the-air broadcasters. Nudity and vulgar words

in theater and film productions, as well as live productions, need not be edited. Cable can serve varied needs through its vast potential.

A New York City cable system is currently experimenting with cablecasting a variety of programs via a leased channel.[31] It is leasing one channel to anyone who will pay the $50 per hour fee. The leasee may, in turn, sell advertising within the show. Although the most popular program has been a "soft porn" show called "Midnight Blue," many other special interest programs are also appearing.[32] Because it is a leased channel, the cable system operator states whatever is programmed is, "...none of our business."[33] Even so, the cable operator must remain cognizant of uncertain cable rules governing obscenity, and cannot yet rely upon the protection of full common carrier status on the access and leased channels.

Yet the Commission emphasizes, in sections of the rules on cablecasting, that cable is in its "experimental stage." "We believe that the best course is to proceed with only minimal regulation in order to gain experience."[34] "We recognize that open access carries with it some risks."[35] "The cable operator similarly must not censor or exercise program content control of any kind over the material presented on the leased access channels."[36]

The upshot of the cablecasting section of the cable rules is that the FCC has ruled cable operators must provide certain channels for access. Those channels are guaranteed to a community by federal law. The local government may not modify their availability except with Commission approval. The cable operator must provide those access channels to local citizens and groups under federally specified conditions, such as "on a first come-first serve basis."[37] And the operator may not censor the contents of the programming cablecast via these channels.[38]

Much of the burden of decision as to standards of programming in those vague areas as defining obscenity, thus, lies with local government. As Miller directed communities must now give clear guidance to all its citizens, cable operators included, as to what these standards are. In light of the fact that most communities have chosen not to set clear-cut written standards for all to follow, the cable operator in most communities is free to lease his channels to anyone for them to program anything they like. The marketplace and local standards will decide what local communities will view via cable television.

Conclusions:

The Supreme Court in Miller v. California stated local communities will now decide what their citizens may watch, hear, read and see. Local community standards apply in defining obscenity. Obscene materials are not protected by the First Amendment, but the local community must define if a work, "...taken as a whole appeals to prurient interests," and if it is "patently offensive." Certain cable television services are also predominantly local. And local communities must decide what shall be cablecast over their local systems.

Commissioner Nicholas Johnson, writing in Sonderling:

> Because the term "obscenity" is so elusive, so incapable of precise delineation, and because governmental regulation of so amorphous a category of expression creates a tension between social demands and the individual's most precious right of free expression, I believe the courts--and not administrative agencies--are more competent to determine whether particular forms of expression fall within the unprotected category...I am extremely reluctant to use my power as a federal official to impose my tastes upon anyone, let alone upon an entire nation.[39]

Throughout the history of obscenity in broadcasting the FCC has asked the courts to act and provide definitive standards. In Illinois Citizens the court merely stated, once again, the Commission can define broadcast standards based on national standards.

Cablecasting differs. In pay-cable, householders must activate, in a deliberate and purposive manner, channels of their individual choosing. There is no surprise when Oh Calcutta is received. Subscribers have initiated a desire to watch such programs, and are willing to pay.

What may be shown on leased cable channels must be predicated upon demand. Allowing all types of adult fare on those channels must be a local decision. The courts have distinguished this right for adults. The Commission asked for a ruling. In Miller the Supreme Court gave them their answer.

Footnotes

[1]Pacifica Foundation v. FCC U.S. Court of Appeals, District of Columbia (Case 75-1391) pending.

[2]Citizens Complaint Against Pacifica Foundation Station WBAI-FM. Memorandum Opinion and Order. Adopted February 12, 1975.

[3]Id. at 8-9.

[4]18 U.S.C. 1464.

[5]The Commission listed the words Carlin recited on the album cut. Those were "fuck, cunt, shit, cocksucker, motherfucker and piss." Citizens Complaint at 3.

[6]Miller v. California, 413 U.S. 15 (1973); United States v. 12 Reels of Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973).

Of these five obscenity cases decided together Miller appears to have been decided first, and held in precedent for the other four, and following cases. This was especially true in United States v. 12 Reels of Film and United States v. Orito where the powers of Congress to prohibit the importation of obscene materials, and their distribution through interstate commerce, were decided.

[7]Roth v. United States, Alberts v. California 354 U.S. 476 (1957). Both cases were decided together as one setting forth the obscenity standards used thereafter. (hereafter cited as Roth.)

[8]354 U.S. 476, 489.

[9]Jacobellis v. Ohio, 378 U.S. 184 (1964).

[10]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 419 (1966).

[11]Illinois Citizens Committee for Broadcasting, et al. v. Federal Communications Commission and United States. 31 RR 2d 1523 (1974).

[12]Sonderling Broadcasting Corporation. 27 RR 2d 285 (1973).

[13]47 U.S.C. 503 (b) (1). 18 U.S.C. 1464.

[14]31 RR 2d 1523, 1533.

[15]47 C.F.R. 76.

[16] 47 C.F.R. 76.215.

[17] In re Carter Mountain Transmission Corp., 32 FCC 459 (1962); 321 F 2d 359 (D.C. Cir. 1963); cert. denied ((375 U.S. 951 (1963)). United States v. Southwestern Cable, 392 U.S. 157 (1968).

[18] 37 Federal Register 30 (February 12, 1972), pp. 3252-3277.

[19] National Association of Utility and Regulatory Commissioners, et al. v. FCC U.S. Court of Appeals, District of Columbia, (Case 75-1075), decided February 2, 1976.

[20] 37 Federal Register 30 at 3277.

[21] 47 C.F.R. 76.31 (a) (1, 2, 3, 4, 5). (b).

[22] 47 C.F.R. 76.51, 53, 54, 56, 57, 59, 61, 63, 65. 91.93.

[23] 47 C.F.R. 76.251 (a) (4, 5, 6, 7).

[24] Stanley v. Georgia, 394 U.S. 557 (1969).

[25] Id. at 569.

[26] Id.

[27] See E. G. Robinson, Jr., tra Palmetto Broadcasting Co. (WDKD) v. FCC. 33 FCC 250, 23 RR 483 (1962), license renewal denied by FCC, 23 RR 486; reconsideration of license renewal denial, denied by FCC, Robinson v. FCC, 334 F 2d 534, 2 RR 2d 2001 (1964). Pacifica Foundation, FCC Memorandum Opinion and Order, 36 FCC 147, 1 RR 2d 747 (1964). In re WUHY-FM, Eastern Educational Radio, 18 RR 2d 860 (1970).

[28] 354 U.S. 476.

[29] Sonderling at 297.

[30] Regina v. Hicklin, (1868) L.R.3 Q.B. 360. The Hicklin Rule stated in part that, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences..." and, Butler v. Michigan, 352 U.S. 380 (1957). Here the Court ruled states could not shield adults from material simply on the argument that juveniles might be exposed to the same materials.

[31] Broadcasting. March 15, 1976, pp. 95-96.

[32] Id. at 95.

[33] Id.

[34] 37 Federal Register 113, Sec. 133.

[35] Id. at Sec. 136.

[36] Id. at Sec. 138.

[37] 47 C.F.R. 76.251 (a) (11) (i).

[38] 47 U.S.C. 326.

[39] Sonderling at 297.